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APR 0 - 2005

No. 04-1055

IN THE

Supreme Court of the United States

SAFE AIR FOR EVERYONE,

Petitioner,

v.

WAYNE MEYER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN LUNG ASSOCIATION AND THE AMERICAN LUNG ASSOCIATION OF IDAHO/NEVADA IN SUPPORT OF PETITIONER

DAVID T. GOLDBERG
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

SEAN H. DONAHUE*
2000 L St., N.W., Suite 808
Washington, D.C. 20036
(202) 277-7085

**Counsel of Record*

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STATEMENT OF INTEREST[1]

The American Lung Association ("ALA") is one of the nation's oldest voluntary health organizations, with a national office in New York City and affiliate associations throughout the country. Founded in 1904 to fight tuberculosis, the ALA now fights lung disease in all its forms, with an emphasis on asthma, tobacco control and environmental health. The ALA is funded by contributions from the public, along with gifts and grants from corporations, foundations and government agencies.

Since the 1960s, the ALA has supported national and local initiatives to combat smoking and reduce air pollution in order to reduce these threats to lung health. Recently, the ALA led initiatives to persuade the Environmental Protection Agency to tighten to regulations to reduce ambient levels of ozone and particulate air pollution, including tighter emissions standards for diesel trucks and buses and for diesel engines used in construction and other off-road equipment. In addition to ALA's legislative, litigation, public education, and research efforts, the ALA in 2004 published its annual survey of air pollution in the United States, entitled THE STATE OF THE AIR: 2004. That study demonstrates that over 81 million people in the United States live in areas where there are dangerous levels of short-term particulate matter pollution, the form of pollution at issue (in an especially acute form) in the present case, and catalogues recent scientific research concerning the effects of such pollution on human health.

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1 Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than counsel for the amicus made any monetary contributions to its preparation or submission. Both Petitioner and Respondents consented to this filing; their letters of consent are being submitted with the brief.

The ALA has appeared in this Court as *amicus curiae* in numerous cases involving air quality and public health issues. *E.g.*, *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

The American Lung Association of Idaho/Nevada, an affiliate of the ALA through a contractual relationship, is headquartered in Reno, Nevada, with offices Las Vegas, Nevada, and Boise, Idaho. The association is dedicated to promoting lung health and preventing lung disease. In addition to work on tobacco control and asthma, the American Lung Association of Idaho/Nevada provides education and advocates for clean air and measures that reduce threats to and improve conditions for the respiratory and pulmonary health and welfare of the people in Idaho and Nevada. The association filed an *amicus* brief in the court of appeals supporting the position of petitioner Safe Air for Everyone.

SUMMARY OF ARGUMENT

In this brief, *amici* wish to highlight the severe health risks associated with the form of pollution at issue in this case: particulate pollution resulting from the open burning of Kentucky bluegrass plants after the seed for which the plants are harvested has been removed. As numerous scientific studies have demonstrated, acute exposure to fine particulate pollution like that produced by respondents' activities poses a variety of serious health problems. These include exacerbating asthma in children; increased hospitalizations for patients suffering from respiratory diseases; inflammation of lung tissue in healthy adults; increased numbers of heart attacks, especially among the elderly, and death from respiratory and cardiovascular causes. The extensive record below poignantly illustrates – in the

testimony of many treating physicians, public health experts, and dozens of North Idaho residents – the grave suffering that acute particulate pollution causes.

By any measure, the form of pollution at issue constitutes a severe health hazard – one that falls squarely within the letter and purpose of the "imminent and substantial danger" provision of Section 7002 of the Resource Recovery and Conservation Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). In addition to permitting the health hazards caused by widespread burning of bluegrass residues, the Ninth Circuit's decision in the case involves a stark misreading of one of the most important federal environmental statutes, a reading that conflicts with the decisions of numerous other courts of appeals and seriously weakens RCRA throughout the country's largest judicial circuit.

The panel majority's ruling that the bluegrass straw that respondents burn has not been "discarded" for purposes of RCRA's definition of "solid waste" – even though the conceded primary purpose of the burning is to dispose of grass residue that must be removed from fields before new crops can grow – represents a bad misreading the statute. If left in place, the court of appeals' construction could exempt from RCRA's coverage all manner of waste management practices regardless of their effects on human health, on the bare excuse that the method of disposal might be said to produce some incidental benefit other than getting rid of the waste (such as providing landfill or generating heat or power).

Section 7002 was deliberately crafted to provide a broad and flexible remedy to address extreme hazards. It does not require the identification of a violation of particular statutory or regulatory requirements, but is simply concerned with providing relief from certain extreme threats to human health and the

environment. This case, which features a severe harm to public health that has not been effectively addressed by government regulators, demonstrates Congress's wisdom in enacting such a provision. Review by this Court is warranted because the panel majority's crabbed interpretation threatens to emasculate this important tool for addressing serious public health hazards.

Finally, we observe that Idaho law provides little protection against the pollution at issue here. Respondents' practices have been effectively exempted from state nuisance law, and state regulators have proven unable to prevent burning from causing the widespread health problems documented in the record here.

ARGUMENT

I. PARTICULATE POLLUTION FROM OPEN BURNING OF AGRICULTURAL WASTES POSES A SEVERE HEALTH HAZARD, ESPECIALLY TO VULNERABLE POPULATIONS SUCH AS CHILDREN, THE ELDERLY, AND THOSE WITH RESPIRATORY DISEASES.

As the record from the proceedings in the district court vividly demonstrates, the open-field burning of bluegrass residues releases very high concentrations of particulate pollution. See Pet. App. A60. The U.S. Environmental Protection Agency has explained that particulate matter is a "mixture of microscopic solids and liquid droplets suspended in the air" and consists of a number of different components including acids, chemicals, metals, soils, dust, and allergens like pollen.[2] Particulate pollution causes a broad range of health

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[2] Particulate Pollution and Your Health, available at http://www.epa.gov/airnow/particle/pm-color.pdf (last viewed March 31, 2005);

problems:

> Short-term exposure to particle pollution can cause premature death. Those deaths can occur on the very day that particle levels are high, or within one to two months afterwards. Unfortunately, particle pollution does not just make people die a few days earlier than they might otherwise: these are deaths that would not have occurred without the pollution. Particle pollution also diminishes lung function, causes greater use of asthma medications, and increases rates of school absenteeism, emergency room visits and hospital admissions. Other adverse effects can be coughing, wheezing, cardiac arrhythmias and heart attacks.[3]

The form of open burning at issue here produces "fine" particulate matter, which presents especially serious public health problems. *E.g.*, CA App. 131-44 (declaration of Richard B. Schlesinger, PhD, concerning impacts of spikes in PM 10 and PM 2.5 as a result of bluegrass residue burning). As stated by pulmonologist David P. York, "the health impact of airborne particles increases as those particles get smaller. This is true because particles are able to pass through the natural filtration mechanisms of the upper airway and penetrate deeper into the lower airway and lungs." C.A. App. 84.[4]

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see also EPA, *Air Quality Criteria for Particulate Matter*, Vol. 1, pp. 2-2, 2-3, EPA/600/P-99-002/2aF (2004).

[3] STATE OF THE AIR 2004 at 48.

[4] See Environmental Protection Agency, *Particulate Pollution and Your Health*, available at http:// www.epa.gov/airnow/particle/pm-color.pdf (last viewed March 31, 2005) ("The size of particles is directly linked to their potential for causing health problems. Small particles less than 10 micrometers in diameter pose the greatest health problems, because they can get deep into your lungs, and some may even get into your bloodstream.");

A substantial body of recent public health research chronicles the effects of short-term increases in particulate pollution, including:

> death from respiratory and cardiovascular causes, including strokes;[5]
>
> increased numbers of heart attacks, especially among the elderly and people with heart conditions;[6]
>
> inflammation of lung tissue in young, healthy adults;[7]
>
> increased hospitalization for cardiovascular disease;[8]
>
> increased emergency room visits for patients suffering from acute respiratory ailments;[9]
>
> increased hospitalization for asthma among children,[10]

STATE OF THE AIR: 2004 at 46.

[5] See Dominici, *et al.*, *On the Use of Generalized Additive Models in Time-Series Studies of Air Pollution and Health*. 3 AM. J. EPIDEMIOL 193 (2002); Hong, *et al.*, D.C. Effects of Air Pollutants on Acute Stroke Mortality, 110 ENVIRON. HEALTH PERSPECT. 187 (2002); Tsai, et al., *Evidence for an Association Between Air Pollution and Daily Stroke Admissions in Kaohsiung, Taiwan*. 34(11) STROKE 2612 (2003).

[6] D'Ippoliti, *et al.*, *Air Pollution and Myocardial Infarction in Rome: A Case-Crossover Analysis*. *14* EPIDEMIOLOGY 528 (2003).

[7] Ghio, *et al.*, *Concentrated Ambient Air Particles Induce Mild Pulmonary Inflammation in Healthy Human Volunteers*, 162 AM. J. RESPIR. CRIT. CARE MED. 981 (2000).

[8] Metzger *et al.*, *Ambient Air Pollution and Cardiovascular Emergency Department Visits in Atlanta, Georgia, 1993-2000*, 15 EPIDEMIOLOGY 46 (2004).

[9] Van Den Eeden, *et al.*, *Particulate Air Pollution and Morbidity in the California Central Valley: A High Particulate Pollution Region*, FINAL REPORT TO THE CALIFORNIA AIR RESOURCES BOARD, CONTRACT 97-303, July 12, 2002.

[10] Lin, *et al.*, *The Influence of Ambient Coarse Particulate Matter on Asthma Hospitalization in Children: Case-Crossover and Time-series Analyses*. 110 ENVIRON. HEALTH PERSPECT. 575 (2002); Norris, *An Association Between*

and
increased severity of asthma attacks in children.[11]

The record from the proceedings below paints a striking picture of the extent of the health problems caused by smoke from respondents' burning of bluegrass stalk residues. Numerous doctors testified about the effects of the smoke on their patients. For example, Dr. John H. Strimas, who directs the North Idaho Allergy, Asthma and Immunology Center, stated that "exposure to smoke from grass residue burning frequently aggravates the existing condition of my patients with pulmonary sensitivities, pulmonary illnesses, and upper respiratory disorders" and that "the aggravation caused by smoke from residue burning is often the trigger for episodes of acute respiratory distress that range in severity from irritating and uncomfortable to dangerous and life threatening." C.A. J. R. 104. Dr. Joyce Gilbert, a pediatrician practicing in Sandpoint, Idaho, stated that:

> The adverse health effects caused by grass residue burning on children can be severe, scary, and traumatic and cause pain, suffering and panic. The effect on small children is especially bad, in that these children often do not understand what is causing their coughing and

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Fine Particles and Asthma Emergency Department Visits for Children in Seattle, 107 ENVIRON HEALTH PERSPECT 489 (1999); Tolbert *et al.*, *Air Quality and Pediatric Emergency Room Visits for Asthma in Atlanta, Georgia*, 151 AM J EPIDEMIOL. 798 (2000).

[11] Slaughter, *et al.*, *Effects of Ambient Air Pollution on Symptom Severity and Medication Use in Children with Asthma*, 91 ANN. ALLERGY ASTHMA IMMUNOL. 346 (2003). Further information about the health effects of acute particulate pollution may be found at STATE OF THE AIR, at 49; HEALTH EFFECTS OF OUTDOOR AIR POLLUTION Part 1, at 29-30; PM Criteria at 1-11, 2- 22.

> wheezing, their great difficulty breathing, and the tightness in their chest that they are experiencing. * * * Newborn babies are at even higher risk because their airways are smaller and more sensitive.

C. A. App. 62; see also C.A. App. 200. Pulmonologist Michael M. McCarthy testified that smoke from the grass residue burning "aggravates the condition of my patients with pulmonary illness" and can trigger "episodes of acute respiratory distress that range in severity from irritating and uncomfortable to dangerous and life threatening." C.A. App. 67. And Dr. Henry D. Covelli declared that "[a]s Respiratory Care Medical Director of Kootenai Medical Center in Coeur D'Alene Idaho, I have witnessed the immediate death of at least one patient who was exposed to smoke from North Idaho grass residue burning, experienced immediate respiratory difficulty, and expired as a result of an exacerbation of his respiratory disease." C.A. App. 92.

Dr Richard B. Schlesinger, an inhalation toxicologist who is a leading expert on the effects of inhaled particulate matter on the human respiratory tract, testified that:

> the adverse respiratory health impacts reported by residents of North Idaho and their treating physicians following exposure to smoke from grass field residue burning are consistent, based on my scientific expertise, with what would be expected following acute exposures to fine airborne PM, such as that emitted by agricultural burning.

CA App. 134. See also C.A. App. 131, 135, 210-18.

Testimony from individual residents of North Idaho residents painted a picture of the hardships respondents'

activities have caused for members of the public, especially for those most sensitive to particulate pollution – the young, the old, and those with respiratory diseases.[12] Trina Heisel testified that the burning forced her to take her daughter, who suffers from cystic fibrosis and who experienced "terrible" symptoms during burning season, to leave the area entirely. ER 180. Laura Fowler testified about the effects of the smoke on her asthmatic daughter, stating that it left her "[u]nable to breathe" or engage in "normal activities that a child would do, go outside, ride a bike[.]" ER 196. Lawrence Bud Moon, the 76-year-old mayor of East Hope, Idaho, testified that the smoke caused him "severe problems with breathing." ER 206.

II. THE DECISION BELOW IS INCONSISTENT WITH RCRA'S PLAIN LANGUAGE AND PURPOSES AND WITH PRECEDENT FROM OTHER CIRCUITS AND THREATENS TO UNDERMINE ONE OF THE MOST IMPORTANT STATUTORY PROTECTIONS FOR PUBLIC HEALTH.

Section 7002 of RCRA allows "any person" to bring an action against

> any past or present generator, * * * who has contributed or who is contributing to the past or present handling,

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[12] The pulmonary diseases that make exposure to particulate pollution like that in question here are widespread. For example, in Idaho alone, a state with a population of just over a million, more than 78,000 children and over 195,000 adults suffer from asthma. Another 113,500 Idahoans suffer from chronic bronchitis. See American Lung Association, *Estimated Lung Disease Prevalence and Incidence by Lung Association Territory* at 15 (September 2004) (available at http://www.lungusa.org/atf/cf/%7B7A8D42C2-FCCA-4604-8ADE-7F5D5E762256%7D/ESTPREV2004.PDF) (last visited April 4, 2005).

> storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). It was "designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms[.]" *Meghrig v KFC Western, Inc.*, 516 U.S. 479, 486 (1996). Given the evidence noted above concerning the severe harms caused by burning of residue grass – and the far more extensive presentations in the record – this would seem to be a paradigm instance in which injured parties could use Section 7002 to obtain relief.[13]

The court of appeals' contrary conclusion is based upon an erroneous interpretation of the key RCRA jurisdictional term "solid waste." The majority construed that term not to embrace the grass residue at issue here on the theory that the residue was not "discarded" for purpose of the statutory definition, 42 U.S.C. § 6903(27). See Pet. App. A15-A18. The court reasoned that the farmers' use of the ash from burning the residue meant that the burning had "farming benefits," even though it was conceded that

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[13] See *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 988 (2d Cir. 1984) ("in amending the emergency powers provision of the RCRA in 1980, the Senate Report explained that the emergency powers provision 'is essentially a codification of common law public nuisance remedies,' emphasizing, however, that it 'should not be construed solely with respect to the common law' because some concepts 'are meant to be more liberal than their common law counterparts'") (quoting S.Rep. No. 172, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S.Code Cong. & Ad.News 5019, 5023); see also Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, ALI-ABA C.L.E. C883 ALI-ABA 81, 95 n.80 (noting "public nuisance-like" character of the cause of action under § 6972(a)(1)(B), which does not require that activities creating the hazard be independently illegal under RCRA or any other law);

the overwhelmingly predominant reason for burning the residue was to clear the fields of bluegrass "straw" so that sunlight and water could reach the seed. The court's reasoning has no support on the face of the statute – or in the ordinary meaning of the term "discarded."[14] As petitioner demonstrates (Pet. 25-28), it is also inconsistent both with decisions of at least five other courts of appeals, and with EPA's definition of "solid waste" in EPA's RCRA Subchapter C regulations, see 40 C.F.R. Pt. 261, a definition that is intended to be significantly *narrower* than the statutory definition. EPA's regulations expressly cover wastes that are "returned to the soil as fertilizers," 40 C.F.R. § 261.4(b)(2). As petitioner demonstrates, because the opinion below is an interpretation of the RCRA's key jurisdictional term "solid waste," it imperils EPA's regulations governing RCRA's application to hazardous waste.

Thus, the court of appeals' narrow interpretation of "solid waste" – a key term not only for citizen actions under Section 7002 but for also for the hazardous waste provisions of Subchapter C – threatens to disrupt RCRA enforcement generally. If burning the residue grass at issue here is considered not to be a form of "solid waste" disposal, then many other activities that pose serious risks to the public – and are primarily intended to "get rid of" substances – could be exempted from RCRA regulation and remedies simply because the owner of the substance is able to claim some incidental use for the resulting ash – whether as fertilizer, as a traction agent for icy roads, or

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[14] See WEBSTER'S THIRD INTERNATIONAL DICTIONARY, 644 (1986) ("to drop, dismiss, let go, or get rid of as no longer valuable"; "Discard indicates dispensing with, letting go of, getting ride of, as not immediately useful; it is not a forceful word and may connote only the mild action of getting rid of a playing card from one's hand (['])he sorted and resorted his cargo, always finding a more necessary article for which a less necessary had to be discarded[']) – Willa Cather)").

simply as landfill.

As the dissenting judge persuasively explained, Pet. App. A24 n.6, there is also no merit to the Ninth Circuit majority's novel and counter-intuitive suggestion that the determination of whether secondary material has been discarded is to be made "independently of how the materials are being handled." Pet. App. A17 n.13. As other courts of appeals have recognized, it is often essential to examine how secondary materials are "handled" to determine whether they are "solid waste" for RCRA purposes. See, *e.g.*, *Owen Electric Steel Co. of South Carolina v. Browner*, 37 F.3d 146, 149 (4th Cir. 1994) (finding manufacturer not entitled to recycling exemption because "[t]he slag is not immediately used in Owen's production process; rather, the slag must sit, untouched, for some six months before it is sold to other entities."); *United States v. Marine Shale Processors*, 81 F.3d 1361, 1366 (5th Cir. 1996); *American Petroleum Inst. v. EPA*, 906 F.2d 729, 740-42 (D.C. Cir. 1999).

III. THE ABSENCE OF REMEDIES UNDER STATE LAW HIGHLIGHTS THE IMPORTANCE OF RCRA SECTION 7002 AS A MEANS TO PROTECT PUBLIC HEALTH.

Whatever avenues of redress are afforded by federal law, one might well expect that traditional common law remedies such as nuisance and trespass would be available under state law for health and environmental harms as grave as those involved in this case. But in the case of the Idaho bluegrass residue burning at issue here, that expectation would be wrong.[15]

As a result of the pattern of widespread health impacts discussed above, northern Idaho residents brought a class action in June 2002 against many of the respondents here, asserting claims based on nuisance and trespass. After a lengthy hearing at which numerous medical and public health experts and state official from Idaho and Washington testified, the state trial court found, *inter alia*, that the smoke emitted by defendants' burning of bluegrass residue had caused "these citizen plaintiffs to have increased medical problems, some very serious, which in turn causes some of them to hole up in their homes or to leave the area completely during the period of burning." Pet. App. in *Moon v. North Idaho Farmers Ass'n*, No. 04-594, at 135a-139a. On the basis of this and similar findings the trial court preliminarily enjoined defendants from burning. While the *Moon* case was pending, however, the defendant bluegrass farmers -- one of whom was also a state legislator -- persuaded the Idaho legislature to enact Idaho Code § 22- 4803A(6),

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[15] Although Idaho does impose some regulatory restrictions upon open burning of bluegrass residue, see Idaho Code § 4803 ("smoke management" program), those restrictions have proven wholly inadequate to prevent serious and widespread harms to the public health.

which provided that crop residue burning of the very sort at issue in the case "shall not constitute a private or public nuisance or constitute trespass."[16]

The unavailability of state remedies even in the face of dire harms like those here demonstrates the wisdom of Congress's decision to include, in RCRA, a broad remedy for citizens facing "imminent and substantial" health hazards. This Court should grant certiorari to ensure that that remedy may be given effect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID T. GOLDBERG
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

SEAN H. DONAHUE*
2000 L St., N.W., Suite 808
Washington, D.C. 20036
(202) 277-7085

Counsel of Record

April 2005

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[16] Plaintiffs in *Moon* attacked the new legislation on the bases that the state had effectively imposed a servitude on their land, necessitating compensation, and that the law violated a state constitutional prohibition against "special legislation." The Idaho Supreme Court, with one justice dissenting, rejected these challenges. *Moon v. North Idaho Farmers Ass'n*, 96 P.3d 637 (2004), *cert. denied*, 125 S. Ct. 1299 (Feb. 22, 2005).